



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 689 OF 2011**

**LILIAN WANJIRU NJOROGE.....PLAINTIFF**

**VERSUS**

**JORETH LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER GAKURE MURIUKI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 5<sup>th</sup> December 2011 and amended on 4<sup>th</sup> October 2013, the plaintiff prays for judgment against the defendant for:-

*(a) A permanent injunction restraining the defendants whether jointly or severally by themselves, their agents, servants or otherwise howsoever from encroaching, trespassing, remaining or in any other manner dealing with LR No. 13330/169.*

*(aa) A declaration that the transfer of the suit property – LR No. 13330/169 by the 1<sup>st</sup> defendant on the 17<sup>th</sup> August 2012 was fraudulent, illegal and therefore null and void and an order that the said transfer be cancelled forthwith.*

*(b) An order directing the 1<sup>st</sup> defendant to forthwith process and issue transfer title to LR No. 13330/169 to the plaintiff and in default thereof the Deputy Registrar of this court do execute all documents necessary to transfer the suit property LR No. 13330/169 from the 2<sup>nd</sup> defendant to the plaintiff.*

*(c) An eviction order against the 2<sup>nd</sup> defendant to remove himself and the structures he has default therefore –a court bailiff be authorized to evict the 2<sup>nd</sup> defendant from the suit premises LR No.13330/169.*

*(d) Such other or further relief as this court may deem fit and just*

*(e) Costs and interest thereon.*

2. Upon being served with copies of plaint and summons to enter appearance the 1<sup>st</sup> defendant entered appearance on 16<sup>th</sup> May 2012 and filed a statement of defence dated 20<sup>th</sup> June 2014.

3. The 2<sup>nd</sup> defendant entered appearance on 25<sup>th</sup> May 2012 and filed a statement of defence dated 2<sup>nd</sup> July 2012, amended on 21<sup>st</sup> November 2013 and filed on 22<sup>nd</sup> November 2013.

4. PW1, Lilian Wanjiru Njoroge, the plaintiff, adopted her witness statement dated 5<sup>th</sup> October 2011. She told the court that she purchased Plot No. 16 also known as LR NO. 13330/169 from one Antony Kariuki Githendu for Kshs.1,000,000/- on 22<sup>nd</sup> March 2007. Before she purchased the property she had established that Anthony Kariuki Githendu had in turn purchased the plot from Walter Mbugua Wairuiko in January 2000. His name appeared in the register of Thome Farmers No. 5 Limited as the owner of Plot No. 16. She further stated that the plot had been fenced with cedar posts by Anthony Githendu. She stated that she took possession and planted napier grass, retaining the share certificate issued in Githendu's name. Joreth Limited, the 1<sup>st</sup> defendant, was the registered owner of the mother title LR No. 13330.

5. The said parcel had been sold to Thome Farmers No. 5 Limited many years ago but a formal transfer had not been effected. She was to

pay a total of Kshs.296,576/= through the firm of M/S Kimani Kahiro Advocates who were acting for Joreth Limited. This was also to facilitate the issuance of title in her name. she paid a total of Kshs.101,600/= to M/S Kimani Kahiro Advocates. She was given a copy of a deed plan No. 262356. Her husband fell ill in the year 2008 before she could finalise the payments. He later passed on, in 2010. She went to follow up on the progress. She found that the 1<sup>st</sup> defendant had constructed a house thereon. She further told the court that the 2<sup>nd</sup> defendant is registered proprietor of LR No. 13330/169 which is her plot. She prays that judgment be entered in her favour as prayed in the amended plaint.

6. PW2 Anthony Kariuki Githendu adopted his witness statement dated 10<sup>th</sup> December 2018 and filed on 6<sup>th</sup> March 2019. He stated that he entered into an agreement for sale of land with Walter Mbugua Wairuiko on 27<sup>th</sup> January 2000. He was purchasing a half an acre plot in Thome Farmers No.5 Limited. The plot was identified as plot no. 16. He stated that he took possession of the plot, fenced it and later sold it to Lilian Wanjiru Njoroge (the plaintiff) in 2007. The sale agreement between him and Lilian (plaintiff) is dated 22<sup>nd</sup> March 2007. He handed over vacant possession to the plaintiff who made some payments to M/S Kimani Kahiro & Co. Advocates, who were then acting for Joreth Limited to have her title processed. He further stated that the payments were made in his name as it was his name that was on the records held by Thome Farmers No.5 Limited.

7. The 1<sup>st</sup> defendant called one witness. DW1, Robertson Nderitu Mwihu stated that he works for the 1<sup>st</sup> defendant as a site manager. He relied on the 1<sup>st</sup> defendant's bundle of documents which he produced as exhibits in this case. He stated that LR 13330/169 ("the suit property") is a subdivision of LR 13330 whose registered owner is Joreth Limited (the 1<sup>st</sup> defendant herein). That LR 13330 is an amalgamation of LR 4990/3 and LR No.4920/3. He further stated that the plaintiff did not produce any documents to show that Joreth Limited (1<sup>st</sup> defendant) had sold the land to Thome Farmers No.5 Limited. That the two companies have no relationship and they are not the same. Further that Anthony Githendu did not buy land from Joreth Limited (1<sup>st</sup> defendant) nor did Thome Farmers No.5 Limited.

8. DW1 further told the court that the 1<sup>st</sup> defendant filed a suit being HCCC 6206 of 1992 seeking to remove the members of Thombe Farmers Nos 5 Limited from the suit property. That vide an order of the court, those members of Thome Farmers No.5 Limited who wished to be given land by the 1<sup>st</sup> defendant were to pay Kshs.200,000 within six (6) months so as to be issued with titles. DW1 told the court that Anthony Githendu (PW2) did not pay the said amount. He further stated that the plaintiff ought to have done a search to establish the ownership of the said land before buying. He confirmed that a title was not processed in the name of the plaintiff.

9. He further stated that he took the 2<sup>nd</sup> defendant to the suit property which was vacant. A surveyor verified the beacons. The 2<sup>nd</sup> defendant paid and a transfer was effected in his favour. That the 2<sup>nd</sup> defendant is in possession and has constructed a house and is residing there. Finally, he stated that the plaintiff did not comply with the court order. she did not pay Kshs.200,000 within the stipulated period. That the 1<sup>st</sup> defendant was not privy to what the plaintiff did with Anthony Githendu (PW2). He told the court that the 2<sup>nd</sup> defendant should be left to enjoy his plot in peace.

10. DW2, Peter Gakure Muriuki, the 2<sup>nd</sup> defendant told the court that he was adopting his witness statement dated 2<sup>nd</sup> July 2012 and the list of documents dated 2<sup>nd</sup> July 2012 and 17<sup>th</sup> June 2013 respectively. He told the court that he bought the suit property from the 1<sup>st</sup> defendant. He was taken to the site and shown three plots. Two were vacant. He told the court that this was in 2007. In 2008 he constructed a house which he is residing in. That during the said construction nobody claimed the said land. He stated that one evening he went home and found summons. He realized that someone else was claiming the land. He informed the 1<sup>st</sup> defendant who advised him to engage an advocate. He further stated that the 1<sup>st</sup> defendant informed him of the mistake in the numbering. He was then given LR No. 13330/169 as LR No. 13330/170 was already developed. He confirmed that he has a title to LR NO. 13330/169 as LR No. 13330/170 was already developed. That when he visited the site the plot was vacant and not fenced and that at the moment his plot is adjacent to a vacant plot. He denied that he has constructed on the plaintiff's plot.

11. At the end of their respective testimonies, parties agreed to tender written submissions and they were given forty five (45) days to do so. By 29<sup>th</sup> January 2020 when the matter came up for mention to confirm filing of submissions, only the plaintiff had filed. Mr. Banji and Mr. Mwathe who held brief for Mrs. Koech and Mrs. R. W. Chege respectively, informed the court that the submissions were ready and they sought leave to file the same before the close of business on 29<sup>th</sup> January 2020. The court granted the defendants leave to file their submissions before the close of business that day. As at the time of writing this judgment, the defendant's submissions are not on record. I will therefore rely on their respective pleadings and the evidence tendered.

12. The plaintiff's submissions are dated 2<sup>nd</sup> December 2019 and filed on 3<sup>rd</sup> December 2019. Counsel for the plaintiff contends that the 1<sup>st</sup> defendant's advocates having notified the plaintiff of the amount payable for title processing and having received the monies on behalf of the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant is estopped from denying the plaintiff entitlement to the suit property. There was no time frame set between the plaintiff and M/S Kimani Kahiro Advocates for the completion of the payment for processing of title. If it had been set, then it ought to have been served on the plaintiff.

13. The plaintiff in her bundle of documents has given a narrative of the relationship between Joreth Limited and Thome Farmers No.5 Limited. The 1<sup>st</sup> defendant did not rebut this evidence and there is no reason not to believe it. The consent order made in HCCC 6206 of 1992 produced by the 1<sup>st</sup> defendant cannot be said to be a determination of the matter as only 6 defendants entered the consent while 17 did not. Further that the plaintiff in this suit was not a party in that suit thus any orders given in that suit cannot be binding on the plaintiff.

14. The 2<sup>nd</sup> defendant, did not tender in evidence a sale agreement between him and the 1<sup>st</sup> defendant over the suit property. Counsel referred to section 3 of the Law of Contract Act. The only evidence tendered is that the suit property was transferred to the 2<sup>nd</sup> defendant was LR NO.13330/170 and the defendants jointly and/or in collusion transferred the suit property while this suit was pending. This transfer offends the doctrine of *lis pendens*.

15. She has put forward the case of **Carol Silcock vs Kassim Sharrif Mohamed [2013] Eklr**. The act of transferring the suit property while the matter was pending was calculated to defeat the ends of justice as the doctrine of *lis pendens* demanded that the status be maintained until the suit was heard and determined. The 2<sup>nd</sup> defendant's intentions were not bonafide.

16. I have considered the pleadings, the evidence on record and the written submissions made on behalf of the plaintiff. The issue for determination are:-

**(i) Whether the suit property was registered in the name of the 1<sup>st</sup> defendant (Joreth Limited).**

**(ii) Did the 1<sup>st</sup> defendant sell part of its land to Thome Farmers No.5 Limited?**

**(iii) Has the plaintiff proved her case on a balance of probabilities?**

**(iv) Is she entitled to the reliefs sought?**

**(v) Who should bear costs?**

17. It is not in doubt that the 1<sup>st</sup> defendant was the registered owner of LR NO. 13330. The same was an amalgamation of LR 4920/3 and LR NO. 4921/3. LR NO. 13330 was sub-divided into several plots LR No. 13330/169 and 170 are some of the plots. These facts were not contested by the plaintiff. It is therefore clear that the suit property was registered in the name of the 1<sup>st</sup> defendant.

18. It is the plaintiff's case that she bought the plot from Anthony Kariuki Githendu who had bought from Walter Mbugua Wairuiko in the year 2000. The said Walter Mbugua had a share certificate from Thome Farmers NO5 Limited. The said plot then was Plot No.16. It is also the plaintiff's case that Thome Farmers No.5 Limited bought the land from Joreth Limited. She relied on a resolution by the Directors of Joreth Limited who had agreed to sell land to Thome Farmers No.5 Limited. The consideration was to be agreed. There is however no sale agreement between Joreth Limited (1<sup>st</sup> defendant) and Thome Farmers No5 Limited to confirm the said sale. If there was any sale then Thome Farmers No.5 Limited would have had a title in its name. I find that the plaintiff has failed to put forth any evidence to confirm that there was a sale of land between Joreth Limited (1<sup>st</sup> defendant) and the Thome Farmers No5 Limited. Anthony Kariuki Githendu was clear when he stated that the land he bought belonged to Thome Farmers NO5 Limited.

19. It is also on record that the 1<sup>st</sup> defendant instituted a suit being HCCC 6206 of 1992 against certain trespassers on its land. It is on record that Thome Farmers NO5 Limited joined the said suit to protect its members' interest. In the end, a consent was reached that the members of Thome Farmers No.5 Limited would be issued with titles by Joreth Limited upon payment of Kshs.200,000 and other expenses. Perhaps this is how, the plaintiff was introduced to the firm of M/S Kimani Kahiro Advocates who were then acting for the Joreth Limited (1<sup>st</sup> defendant). She confirmed that she was given a breakdown of what amounts she was to pay. She was asked to pay a total of Kshs.296,576 in order for the title to be processed. She admitted that she paid Kshs.13,600 for the deed plan, and a further Kshs.80,000.

20. It is clear that she did not pay the full amount due. It is clear that at this point the plaintiff knew that the suit property belonged to the 1<sup>st</sup> defendant. This is why she agreed to pay the additional amounts. She did not pay in full. She has a good explanation for this but the fact remains she did not pay the amounts due. By the time she followed up the matter, she was referred to a new firm of advocates who had taken over from M/S Kimani Kahiro advocates. She later went to the suit property and discovered the 2<sup>nd</sup> defendant has constructed a house thereon.

21. It is the 2<sup>nd</sup> defendant's case that he bought LR NO. 13330/170 from the 1<sup>st</sup> defendant. DW1 confirmed that he showed the 2<sup>nd</sup> defendant the suit property. A surveyor was then instructed to confirm the beacons. Both the 1<sup>st</sup> and 2<sup>nd</sup> defendants confirm that there was a mistake on the numbering, that in fact the plot that the 2<sup>nd</sup> defendant was shown was LR 13330/169 and this is where he has constructed a house. It should be appreciated that the mistake in the numbering was not of his own making but rather of the 1<sup>st</sup> defendant's since the 1<sup>st</sup> defendant was the owner of the two plots. A rectification on the numbering was done. The 2<sup>nd</sup> defendant confirmed that the adjacent plot is vacant and/or undeveloped.

22. In a nutshell, the plaintiff has failed to demonstrate that she bought the suit property from the 1<sup>st</sup> defendant. Though she paid some amounts she did not pay in full in order for the title to be processed on her name. The 2<sup>nd</sup> defendant has since paid for the plot. He has constructed a house thereon. I find that he is the rightful owner of the suit property. The plaintiff has failed to demonstrate that the 2<sup>nd</sup> defendant did all this in collusion with the 1<sup>st</sup> defendant to defeat the plaintiff's claim.

In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR Tunoi JA** stated that:-

***“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”***

I find that the plaintiff has failed to discharge her burden of proving fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. She has also failed to prove any collusion on the part of the defendants.

23. However, it has not escaped this court's attention that the transfer in favour of the 2<sup>nd</sup> defendant was effected on 17<sup>th</sup> August 2012

during the pendency of this suit. I agree with the plaintiff's counsel that the doctrine of *lis pendens* demanded that the status quo be maintained until the suit was heard and determined. However, I find that it would serve no purpose to cancel the said title given the above finding that the 2<sup>nd</sup> defendant is the rightful owner of the suit property, as the plaintiff has failed to prove that she is entitled to the same.

24. I find that the plaintiff has failed to prove her case against the defendants on a balance of probabilities particularly that the defendant colluded to defeat her claim. The plaintiff is however encouraged to approach the 1<sup>st</sup> defendant with a view of being offered an alternative plot upon full payment. This is because the 1<sup>st</sup> defendant does not dispute that the plaintiff paid some monies to M/S Kimani Kahiro Advocates who were acting on its behalf.

25. In conclusion, I find that the plaintiff has failed to prove her case against the defendants in a balance of probabilities. She is therefore not entitled to the reliefs sought in the plaint. The plaintiff's suit is hereby dismissed with costs to the defendants.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 24<sup>th</sup> day of September 2020.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Kingara for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Kajuju -Court Assistant